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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

STEPHEN T. DAVIES Plaintiff and Appellant, v. STEVEN A. SCHECTMAN et al. Defendants and Respondents	A125276 (Humboldt County Sup. Ct. No. DR 010441)

Appellant Stephen Davies filed suit in the Humboldt Superior Court on June 13, 2001. On July 8, 2008, the trial court granted defendants' motion to dismiss for failure to bring the matter to trial within five years.[1] (Code of Civ. Proc., § 583.310.)[2] Davies contends this was error and a prejudicial abuse of discretion. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

We state the facts as best we can discern them from the limited record provided by Davies.[3] No respondent's brief has been filed. Although failure to file a respondent's brief may be considered a consent to reversal, the " 'better rule . . . is to

[1] The judgment of dismissal was not entered until March 27, 2009.

[2] All further code references are to the Code of Civil Procedure unless otherwise indicated.

[3] While a register of actions is included within the clerk's transcript, the earliest pleading included is a "Notice of Case Management Conference to Set Trial Date" filed by Davies's counsel on September 24, 2007.

examine the record on the basis of appellant's brief and to reverse only if prejudicial error is found.' [Citations.]" (*In re Bryce C.* (1995) 12 Cal.4th 226, 232–233.)

Davies, an attorney, sued defendant Steven A. Schectman, also an attorney, and others alleging that Schectman hired him to do work on certain litigation and failed to pay him for that work.[4] The filing date of the complaint is reflected in the Humboldt Superior Court register of actions as June 13, 2001. On September 28, 2001, a demurrer was sustained in its entirety with leave to amend 7 of 13 causes of action. Davies chose not to amend and appealed prematurely in the first instance.[5] On October 3, 2002, we issued our opinion affirming the judgment of dismissal as to all causes of action except claims for breach of contract and quantum meruit, and remanded the matter to the trial court for further proceedings on those claims. (*Davies v. Schectman* (Oct. 3, 2002, A096746/A097008) [nonpub. opn.].) On November 1, 2002, we issued an order denying requests by both Davies and Schectman for rehearing, and making nonsubstantive modifications to the opinion. The remittitur issued on December 3, 2002, and was received by the trial court on December 5, 2002.

The register of actions indicates ongoing activity in the case, including motions and hearings, between return to the trial court and Davies's September 24, 2007 notice of case management conference. Davies provides none of this record, except to the extent that selected portions are attached as exhibits to subsequent pleadings. The record does reflect that a trial date was set for February 11, 2008, that Schectman objected and on February 19, 2008, filed a motion for judgment on the pleadings and motion to dismiss for failure to bring the matter to trial within five years. (§§ 583.310, 583.360.) Davies filed an opposition to the motion. Schectman

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[4] The complaint is not included in the record provided. Perhaps this is because the complaint was at least 97 pages long, with nearly 200 pages of exhibits.

[5] A notice of appeal was first filed on October 25, 2001. The judgment of dismissal was not entered until November 8, 2001. On our own motion we take judicial notice of our records in the prior proceedings. (Evid. Code, §§ 452, 459.)

submitted a reply. On May 12, 2008, the motions were heard before the Honorable Philip Schafer, an assigned retired judge.[6] Because of issues raised during argument, Judge Schafer gave the parties an opportunity to submit supplemental briefs on the application, if any, of section 583.320, the three-year dismissal statute, with the matter to stand submitted as of June 6, 2008. Davies submitted a supplemental brief. Schectman did not. On July 8, 2008, the court entered a written ruling, finding that section 583.320 did not control, since it would have the effect of reducing the five-year period to bring the matter to trial (see § 583.320, subd. (b)), but granting the motion to dismiss under section 583.310. For reasons not explained, the judgment of dismissal was not filed until March 27, 2009. Davies's notice of appeal was timely filed on April 16, 2009.

II. DISCUSSION

In reviewing the trial court's dismissal of an action for failure to bring the matter to trial within five years, we apply an abuse of discretion standard. (*Coe v. City of Los Angeles* (1994) 24 Cal.App.4th 88, 92.) "The trial court's discretion 'is not unlimited and must be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. [Citations.]' [Citation.]" (*Ibid*., final citation omission added.)
" 'In reviewing the lower court's dismissal of [an] action for failure to prosecute, the burden is on appellant to establish an abuse of discretion. [Citation.] We will not substitute our opinion for that of the trial court unless a clear case of abuse is shown and unless there is a miscarriage of justice. [Citation.]' [Citation.]" (*Sagi Plumbing v. Chartered Construction Corp.* (2004) 123 Cal.App.4th 443, 447 (*Sagi Plumbing*), only final citation omission added.)

Davies recognizes the appropriate standard of review, but to say that Davies's brief lacks clarity and focus would be a charitable understatement. Davies contends

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[6] The record does not disclose the basis for the assignment, but it does appear that six members of the Humboldt bench were disqualified under either section 170.6 or 170.1.

that the trial court abused its discretion "to the extent that it determined that all cases must be dismissed within five years of the filing of the complaint pursuant to C.C.P. sections 583.310 or 583.320." The court made no such determination. While denying that either the three-year or five-year statutes have any application at all, Davies nevertheless contends that the court further abused its discretion in failing to find tolling of the five-year statute in that it was impossible or impractical to bring the matter to trial, and that the court "did not grant Plaintiff and Appellant an opportunity to argue tolling pursuant to section 583.340(c) in connection with a Court ordered motion for dismissal pursuant to C.C.P. section 583.320."

It appears that Davies's material arguments can be reduced to four points: (1) the hearing on the demurrer to his complaint, resulting in the November 8, 2001 dismissal, was a "trial," rendering the dismissal statutes thereafter inapplicable; (2) the dismissal statutes were in any event tolled for much of the relevant time because of amendments to the pleadings necessary to conform to the earlier ruling of this court; (3) the statutes would otherwise be tolled due to discovery stays and motion practice; and (4) the trial court should have found that it was impossible or impracticable to earlier bring the matter to trial, and he was denied the opportunity to fully brief this issue. Only his first point has merit, and it is ultimately unhelpful to his case.

We start from the settled and fundamental premise that "[a] judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

A. The Five Year Dismissal Statutes

Section 583.310 provides that: "An action shall be brought to trial within five years after the action is commenced against the defendant." An action is commenced upon the filing of the initial complaint. (*Brumley v. FDCC California, Inc*. (2007) 156 Cal.App.4th 312, 318.) An action *shall* be dismissed by the court on its own

motion or on motion of the defendant if not brought to trial within this five-year period. (§ 583.360, subd. (a), italics added.) "The requirements of this article are *mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute*." (§ 583.360, subd. (b), italics added.) Sections 583.310 and 583.360 are written in absolutist language and together "establish what is known to California litigators as the 'five-year rule.' [Citation.]" (*County of Orange v. Quinn* (2002) 97 Cal.App.4th 956, 959.)

Section 583.310 implements the Legislature's policy to discourage stale claims. (*Santangelo v. Allstate Ins. Co.* (1998) 65 Cal.App.4th 804, 814 (*Santangelo*).) "The statute serves to 'prevent[] prosecution of stale claims where defendants could be prejudiced by loss of evidence and diminished memories of witnesses [and] to protect defendants from the annoyance of having unmeritorious claims against them unresolved for unreasonable periods of time. [Citations.]' [Citation.]" (*Sagi Plumbing, supra,* 123 Cal.App.4th at p. 447, only final citation omission added.) "[U]nless some specified exception applies, a trial court has a mandatory duty to dismiss an action[,] and a defendant has an absolute right to obtain an order of dismissal, once five years have elapsed from the date the action was commenced." (*M & R Properties v. Thomson* (1992) 11 Cal.App.4th 899, 903.)

B. The Effect of the Demurrer

Davies first argues here, as he did in the trial court, that a "trial" of his action within the meaning of the statute occurred when a demurrer to his complaint was sustained and a judgment of dismissal was entered on November 8, 2001. Citing *Berri v. Superior Court* (1955) 43 Cal.2d 856 (*Berri*), he contends that the five-year limitations statute no longer had any application, since it "only requires that an action be brought to trial once within five years." He correctly cites the holding of *Berri* that a dismissal resulting from a sustained demurrer may be considered a "trial," but he is incorrect in the ultimate conclusion he seeks to draw from that characterization.

In *Berri*, the trial court sustained a demurrer, without leave to amend, 48 days prior to the expiration of the five-year period after commencement of the action, but entered no judgment. (*Berri, supra,* 43 Cal.2d. at p. 858.) Because there was no judgment, an appeal from the order was accordingly dismissed. (*Ibid*.) The trial court refused a subsequent request to enter a judgment on the grounds that the five-year period under former section 583 had by that time lapsed.[7] Granting mandamus to require entry of judgment, the Supreme Court noted that "[w]ith regard to the running of the five-year period, it has been held that the determination or a hearing on a demurrer to the complaint is not a trial within the meaning of section 583 of the Code of Civil Procedure and hence the action is subject to dismissal after the five-year period has expired unless the ruling on demurrer is a final determination of the case." (*Id*. at p. 858.) But where there has been a judgment of dismissal after a demurrer is sustained without leave to amend, or leave to amend is granted but the plaintiff fails to amend within the time allowed, the action is finally terminated by the judgment, and there is nothing left to dismiss under section 583. (*Id*. at p. 859.) The trial court therefore erred in relying on former section 583 to avoid entry of judgment on the demurrer, and the matter was remanded with direction to enter the judgment. Observing that it was still possible, before entry of judgment, for the trial court on remand to change its ruling on the demurrer, the *Berri* court then opined in dicta that the action would not be subject to dismissal in that event because there had been, in effect, a partial trial of the action and that section 583 would be "inoperative," since "[a] partial trial of an action takes [a] case out of the operation of section 583." (*Id.* at p. 861 [citing *City of Los Angeles v. Superior Court* (1940) 15 Cal.2d 16].)

Davies interprets this to mean that his case, by virtue of his own inartful initial pleading and only partially successful appeal, was forever thereafter exempted from

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[7] *Berri* involved a substantially similar predecessor version of section 583.310 et seq.

the legislatively imposed time constraints on bringing his matter to final resolution. Not so. In the first instance, such an interpretation would lead to absurd results—rewarding defective pleadings, which waste scarce judicial resources, while effectively penalizing more careful advocates for their professional skill. Cooperation between counsel to resolve pleading issues without the necessity of judicial action would likewise be discouraged. Further, it would be directly contrary to the legislatively expressed policy to discourage stale claims. (*Santangelo, supra,* 65 Cal.App.4th at p. 814.) Davies can only reach this result, however, by further contending that section 583.320, requiring trial within three years following reversal on appeal, also has no application.

C. Application of Section 583.320

Section 583.320 provides: "(a) If a new trial is granted in the action the action shall again be brought to trial within the following times: [¶] (1) If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, within three years after the order of the court declaring the mistrial or the disagreement of the jury is entered. [¶] (2) If after judgment a new trial is granted and no appeal is taken, within three years after the order granting the new trial is entered. [¶] (3) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within three years after the remittitur is filed by the clerk of the trial court. [¶] (b) Nothing in this section requires that an action again be brought to trial before expiration of the time prescribed in Section 583.310."

In a rather remarkable display of sophistry, Davies argues that "trial" as used in this section has a different meaning than that in sections 583.310 and 583.360. He is wrong.

Despite his argument that our Supreme Court's decision in *Berri* is controlling authority, and that he has in fact brought his case to "trial" by virtue of the sustained demurrer to his complaint, Davies then asserts—on the very next page of his brief—that "California Courts consistently and unequivocally hold that an order *sustaining a*

demurrer with leave to amend does not constitute a trial within the meaning of the mandatory dismissal statutes."

Again, Davies correctly cites language of appellate decisions without recognition that they fail to apply to the facts before us. He cites *Mass v. Superior Court* (1961) 197 Cal.App.2d 430 (*Mass*) and *Wiggins v. Washington Nat. Life Ins. Co*. (1966) 246 Cal.App.2d 840 (*Wiggins*) for the proposition that sustaining a demurrer, with leave to amend, does not constitute a trial within the meaning of Code of Civil Procedure, section 583.320. (*Mass*, at p. 435; *Wiggins*, at p. 845.) Of course, although both cases contain the cited language, neither involved a demurrer. In *Wiggins* an argument was made that a motion to transfer a matter from the municipal to the superior court was a trial. In *Mass*, the contention was that hearing on a motion to remand for an administrative hearing, following remittitur from an earlier appeal, constituted a trial for purposes of former section 583. In both instances the claims that these proceedings were "trials" were rejected because they did not involve a determination of an issue of fact or law presented by the pleadings. (*Wiggins*, at p. 844 ["a trial must necessarily involve the determination of some issue of fact or of law raised by the pleadings or directly connected therewith"]; *Mass*, at p. 436.)

Davies ignores the salient factor here that he elected not to amend his complaint when the demurrer was sustained, and that a judgment was entered accordingly. As he admits, dispositions in which a trial court has sustained a demurrer without leave to amend, or where a defendant was granted a summary judgment or other judgment on the pleadings, the rights of the parties have been finally determined on the merits of the case, either factually or legally, and are considered a trial for the purpose of applying the "new trial" language of section 583.320. (*Fannin Corp. v. Superior Court* (1974) 36 Cal.App.3d 745, 753–754 [applying former statute].) Had Davies not been partially successful in his prior appeal, there would have been a final judgment on the merits of his action.

Davies further ignores entirely, and therefore makes no attempt to distinguish, binding Supreme Court precedent contrary to his position on this issue.[8] In *McDonough Power Equipment Co. v. Superior Court* (1972) 8 Cal.3d 527, our Supreme Court held that a "trial" within the meaning the three-year statute occurs where a judgment of dismissal is entered after the sustaining of a demurrer without leave to amend. (*Id.* at pp. 532–533.) The demurrer in *McDonough* was sustained on the basis of the statute of limitations. The judgment of dismissal was then reversed on appeal. The defendant later moved for dismissal of the case under the three-year statute when the matter was not brought to trial within three years of the remittitur. (*Id.* at p. 530.) The motion was denied and the defendant sought a writ of mandate. Rejecting the argument that the three-year statute applies only where a judgment is reversed after a previous trial on the merits, the court concluded that "a hearing on a demurrer constitutes a trial when the ensuing ruling is followed by a judgment of dismissal. . . . 'The essential thing is that the action be brought to a stage where final disposition is to be made of it.' " (*Id.* at pp. 531–532, italics omitted; see also *Finnie v. District No. 1 - Pacific Coast Dist. etc. Assn.* (1992) 9 Cal.App.4th 1311, 1317–1320 [application of § 583.320, subd. (a)(3) proper after remittitur issued following court of appeal reversal of dismissal for lack of subject matter jurisdiction].)

Therefore, subject to any tolling periods, section 583.320 required Davies to bring his action to trial within three years of the remittitur to the trial court on his prior appeal (i.e., December 5, 2005), or within the term provided under the five-year statute to the extent it provided for a longer period (i.e., June 13, 2006). (§ 583.320, subd. (b) ["[n]othing in this section requires that an action again be brought to trial before expiration of the time prescribed in Section 583.310"].) The effect of section 583.320, subdivision (b) is to prevent a mandatory dismissal of an action at a

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[8] This is particularly disturbing since this case was brought to Davies's attention in Schectman's reply brief below. That Davies fails to even acknowledge, much less attempt to distinguish, a Supreme Court decision contrary to the argument he presents suggests an attempt to mislead this court.

time more than three years after the filing of a remittitur but less than five years since the filing of the complaint. (See *Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1006 [construing former § 583].) Since it is undisputed that Davies failed to bring the matter to trial within five years of filing his complaint, the only remaining question is whether there was any applicable extension, excuse or exception that justified his failure to do so. (§ 583.360, subd. (b).)

D. Tolling Periods

The period between the filing of the complaint and the first trial date set (February 11, 2008) was 6 years 7 months and 29 days.[9] The time within which an action must be brought to trial excludes any period in which "[t]he jurisdiction of the court to try the action was suspended." (§ 583.340, subd. (a).) A trial court's jurisdiction to try an action is suspended during the time that an appeal is pending. (*Bergin v. Portman* (1983) 141 Cal.App.3d 23, 26.) Davies's first *effective* notice of appeal was filed on November 19, 2001. The remittitur was received by the trial court on December 5, 2002. Exclusion of this period of 1 year and 16 days leaves 5 years 7 months and 13 days that the complaint was pending.

Davies contends that prosecution or trial of the action was stayed or enjoined (§ 583.340, subd. (b)) from the time of the remittitur through June 28, 2004—a further period of 1 year 6 months and 23 days. He alleges that during this time there was no "operative pleading," and that he was precluded from conducting discovery. If he were correct, dismissal would have been premature. He is not.

Davies assertion that "there was no operative complaint on file" appears to derive from the observation in our prior unpublished decision that the trial court had not yet ruled on a motion to strike superfluous language in the factual and jurisdictional allegations in the pleadings, and that "[s]hould such a motion be renewed, it will undoubtedly result in a much-needed paring down of the complaint,

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[9] We will assume that the matter would have proceeded to trial on the scheduled date of February 11, 2008, but for the motion to dismiss—even though the motion was not filed until February 19, 2008.

which is littered with evidentiary facts and legal conclusions." (*Davies v. Schectman, supra,* A096746/A097008.) Davies attached to his pleading below a portion of a transcript of a hearing on July 21, 2003, in which the court ordered the parties to meet and confer on edits to the complaint (before proceeding to a ruling on a then pending motion to compel discovery). He provides no information as to the outcome of this meet and confer process, or the final disposition of any motion to strike,[10] but it is in any event irrelevant. First, he is incorrect that there was "no operative pleading," since two causes of action were restored by virtue of the prior appeal. Second, the "time consumed by the delay caused by ordinary incidents of proceedings" like disposition of demurrer and amendment of pleadings is not excluded from a computation of the five-year period.[11] (*Perez v. Grajales* (2008) 169 Cal.App.4th 580, 594 (*Perez*).)

His contention that there was a stay on discovery, excusing timely trial, fails because Davies provides no support from the record below that any such order was actually entered, nor does he establish the duration of any such "stay."[12] While he makes the statement that discovery was "stayed" from the time of the remittitur, the only evidence he cites from the trial court record is a minute order of June 28, 2004, noting that "Stay is lifted as to Discovery." The partial transcripts Davies provides of July 21, 2003 and August 11, 2003 hearings also mention discovery stays, but give us no information as to the scope or duration of any limitations on discovery. Pointedly, no orders on the subject are included within the record or are discernable

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[10] There is an indication in the register of actions that the motion to strike was taken under submission on March 24, 2003.

[11] As in *Perez*, Davies also argues that tolling should be added for the period of time when Schectman's counsel had filed notices of unavailability. We likewise reject Davies's claim here. He provides no copies of these notices to show their duration, and the argument is in any event forfeited by failure to present it in the trial court. (*Perez, supra,* 169 Cal.App.4th at p. 591.)

[12] The parties apparently agreed below that there were some limitations imposed on discovery, but disagreed on the duration.

from the register of actions, and Judge Schafer found none in the record before him. Further, the limited record that has been provided to us does not support a claim that discovery was ever completely stayed, for whatever period. The register of actions, as well as the transcript excerpts provided by Davies, reflect motions and appearances related to discovery between March 2003 and June 2004. Judge Schafer, who had the entire trial court record before him, noted the absence of any order staying discovery, but assumed that discovery had been limited for some period of time, observing that the parties were in court "several times before the stay was lifted for proceedings related to the pleadings and motions. For example: On June 16, 2003 Plaintiff filed a Notice of Motion Compelling Responses to Request for Admissions and/or Alternatively for Sanctions; Points and Authorities; On April 19, 2004 he filed a Notice of Motion to Compel Production of Documents from the California Unemployment Insurance Appeals Board. Thus, whatever the precise language of the discovery stay order, it is clear that it did not operate nor did the Court or the parties interpret it to be a total suspension of activity until the happening of a defined contingency." Judge Schafer therefore concluded that "prosecution was not stayed or enjoined and the clock is not tolled because of the discovery stay."

"Generally, delays encountered in discovery are part of the 'normal delays involved in prosecuting lawsuits' and do not excuse failure to bring a case to trial within the five-year limit." (*Bank of America v. Superior Court* (1988) 200 Cal.App.3d 1000, 1016.) It is Davies's burden to show it was impossible or impracticable to proceed to trial without the delayed discovery. (*Ibid*.) He has not even attempted to do so. Even if we were to assume that a complete stay of discovery would result in tolling of the five-year statute, Davies makes no showing that this was the case here, and consequently fails to meet his burden of establishing, either as a matter of law or as a question of fact, that any limitation on conduct of discovery was responsible for his failure to bring his case to trial within the limitations period.

E. Other Arguments

Davies also inexplicably argues that the court abused its discretion in "failing to provide Plaintiff opportunity to provide a full and complete briefing to a motion brought pursuant to C.C.P. Section 583.320." The record reflects otherwise. Application of section 583.320 was an issue raised by Schectman in his reply brief below, and which he argued at the hearing. Davies objected that he had not had an opportunity to address this issue in his pleadings, and asked for an opportunity to provide a written response. As previously noted, Davies was given the opportunity to submit briefing on this issue and did so.

His additional argument now appears to be that had he known that application of section 583.320 would be an issue, he would then have presented evidence that the statute was tolled under the provisions of section 584.340, subdivision (c),[13] and that he was somehow prevented from doing so. There are at least four difficulties with this argument. The first is that Davies made no request to present such evidence, either at the hearing or in his supplemental brief. The second is that he specifically and explicitly disclaimed any contention that this section applied, and argued that authorities cited by Schectman on this issue in his motion to dismiss were "irrelevant." Davies continues to argue here that "[e]xtensive argument on the diligence of counsel and the existence of stays was not necessary to defeat the motion, and, indeed is logically counterproductive" in light of his primary argument that the dismissal statutes are inapplicable. Third, Davies fails to explain why the tolling provisions of section 583.340, subdivision (c) would be relevant to an argument against dismissal under section 583.320, but somehow not under section 583.310. He cannot now claim that the trial court abused its discretion in not considering evidence or argument on an issue he did not seek to raise below, and in fact expressly eschewed.

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[13] "In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed: [¶] . . . [¶] (c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile." (§ 583.340, subd. (c).)

Finally, Davies points to no evidence that he would have been able to present to meet his burden to establish impossibility, impracticability, or futility, or to demonstrate reasonable diligence on his part in prosecuting the case. "To establish reasonable diligence, the plaintiff must be able to demonstrate diligence in pursuit of his duty to expedite the resolution of the case at all stages of the proceedings, including the specific duty to use every reasonable effort to bring the matter to trial within the five-year period. [Citation]." (*Lauriton v. Carnation Co*. (1989) 215 Cal.App.3d 161, 164–165.) Davies had the burden of proving that it was impossible to bring the action to trial within five years. (*Tamburina v. Combined Ins. Co. of America* (2007) 147 Cal.App.4th 323, 329.)

As Judge Shafer found: "Plaintiff has been busy, but not diligent." "The determination 'of whether the prosecution of an action was indeed impossible, impracticable, or futile during any period of time, and hence, the determination of whether the impossibility exception to the five-year statute applies, is a matter within the trial court's discretion. Such determination will not be disturbed on appeal unless an abuse of discretion is shown. [Citations.]' [Citation.]" (*Sanchez v. City of Los Angeles* (2003) 109 Cal.App.4th 1262, 1271, final citation omission added.) Davies has shown no abuse of discretion.

Davies also complains that the trial court failed to distinguish in its ruling whether it was applying the five-year statute (§583.310) or the three-year statute (§ 583.320). Judge Schafer stated in his written ruling that "[t]he conclusion is that the three[-]year statute does not apply because that would have the effect of reducing the basic five[-]year rule . . . ." It would perhaps be more accurate to state that the remittitur provisions of section 583.320, subdivision (a)(3) apply, subject to the longer five-year total period provided by sections 583.320, subdivision (b), and 583.310. "We do not review the trial court's reasoning, [however,] but rather its ruling. A trial court's order is affirmed if correct on any theory, even if the trial court's reasoning was not correct." (*J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15–16.)

III. DISPOSITION

The judgment of dismissal is affirmed.

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Bruiniers, J.

We concur:

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Simons, Acting P. J.

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Needham, J.